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Supreme Court, U.S.
FILED

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**No.**

IN THE

# Supreme Court of the United States

DECEMBER TERM, 2000

ETHEL STEPHENSON,
*Petitioner,*

v.

Raskas Dairy, Inc.,
*Respondent.*

On Appeal From The Supreme Court of Misouri

## PETITION FOR WRIT OF CERTIORARI

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69 pp

## QUESTIONS PRESENTED

1. Whether the legal principle that an Appellate Court cannot adopt its own version of disputed facts to reverse a jury verdict is a federal law applicable to and interwoven in the law throughout the land, and thus an issue reviewable by this Honorable United States Supreme Court.

2. Whether the June 6, 2000 Missouri Court of Appeals, Eastern District, Opinion, in adopting its version of the facts, contrary to that adopted by this jury, and approved by the October 3, 2000 Missouri Supreme Court refusal to Transfer, violated the Due Process Clauses of Article XIV of the Amendments to the United States Constitution.

3. Whether, under the discrimination law of the land, an Employer has an affirmative duty to give an open job to an Employee, who can no longer perform certain labor intense jobs, at which she previously worked for 28 years, when she was eminently qualified for opened positions of a clerk, supervisor or instructor.

## LIST OF PARTIES

The Petitioner before this Honorable Supreme Court of the United States is Ethel Stephenson, a female individual. The Respondent Raskas Dairy is a privately held Missouri Corporation.

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## STATEMENT OF THE CASE

## FACTS

Ethel Stephenson was born January 23, 1945. She went to work March 8, 1968 for Raskas Dairy, where she continued to work until layed off January 17, 1996. She worked on practically every job at Raskas Dairy. In 1982, she sustained a ruptured lumbar disc at the Dairy for which she had surgery. She was out of work one year and three weeks. She returned to work and worked continuously until May 23, 1994, when she had bi-lateral carpal tunnel syndrome surgery by the Workers' Compensation surgeon. She was then off of work for eleven weeks and returned in August 1994, working in the main C Plant. She received treatment for bi-lateral carpal tunnel syndrome until February 1995. Plaintiff filed her Missouri Workers' Compensation Claim April 3, 1995, which the Division of Workers' Compensation acknowledged April 11, 1995. Defendant's Answer was filed April 27, 1995. In early June 1995, Plaintiff, then number two on the Seniority List, along with Ralph Atkins, was sent to the Hamilton Warehouse. Ralph Atkins had also just filed a Workers' Compensation Claim. A whole different group of people were in management control at Raskas in 1995 than in previous years. It became common knowledge that Plaintiff was transferred to the Hamilton Warehouse because she filed a Workers' Compensation Claim. When transferred, Plaintiff could have worked as an instructor or supervisor, which is not manual labor, or could have put on stickers by hand, rather than use a labeling gun. Within the first three months after Plaintiff was assigned to the Hamilton Warehouse, she had to work on the second floor, making thick cardboard boxes by hand

and stack them on skids in violation of her medical restrictions. Noise and fumes from forklifts were everywhere, and she could hardly breathe, to the point she had to have an inhaler. An independent witness testified Defendant's lawyers said to get rid of Plaintiff, and that was the reason Defendant never "found a job" for her. Defendant's lawyers only became involved after the Workers' Compensation claim was filed. Plaintiff was the sole female employee assigned to work in the Hamilton Warehouse, which had deplorable conditions, described in detail and summarized as a dungeon. To get to the bathroom, Plaintiff had to go through the men's locker room. One time a trucker walked in on her. There was no lock on the door, no soap, no towels, a hole in the door, and the commode did not flush properly. The whole bathroom was filthy. One worker said that bathroom was not fit for a lady to use. Because the bathroom was so deplorable, Plaintiff had to walk across the street in all kinds of inclement weather, use an entry card, and then a combination lock to get to the main C Plant, where she had to walk some distance to the bathroom. Contrary to Defendant's position, Defendant required Plaintiff to do the same work she was doing in the C Building (labeling) and/or even heavier work of 2,500 labels per day, in violation of her medical restrictions of no lifting over 30 lbs. and no repetitive use of the hands and wrists. Plaintiff alone was required to walk across the street in all kinds of weather to get her weekly paycheck, whereas every other Employee in the Hamilton Warehouse had their paychecks delivered. For the first time in 28 years, Plaintiff was required to keep a daily record of the work she performed. A supervisor chided Plaintiff about the poor production she was doing, while snatching a labeling

gun from her. Defendant's foreman told Plaintiff this $30,000,000.00 company, with 350 employees, could not afford $30.00 to buy a better labeling gun to use for the job of labeling 2,500 lids a day. Defendant cancelled a meeting to discuss what jobs she could do in the company, when she insisted on her legal right to have her worker's compensation attorney present. The meeting was to be held with Chris Celeslie, the company's Employee Relations Manager, the Plant Manager, and the claim's manager handling her Workers' Compensation Claim. Within a short time thereafter, she was layed off. Defendant gave Plaintiff a layoff in January 1996 because she could not do three jobs, which violated her work restrictions, and one of which she was previously refused because of her weight lift restrictions, all when other light duty jobs she could have done were available. On January 17th, Plaintiff was layed off with a letter that says there was no position open Plaintiff was capable of doing, given her present physical work restrictions. The letter said they continued her on light duty, but Plaintiff vehemently denied that. Defendant gave Plaintiff a belated false bid for a job that never really existed on March 13, 1997. That occurred on the second day of the presentation of her evidence at the Division of Workers' Compensation. Defendant fired Plaintiff February 1, 1999 when she, in fact, could have worked as a supervisor or an instructor, or done light duty work at Defendant's place of employment. The Opinion erroneously states Thompson described this as a temporary job. Plaintiff's evidence was supervisor jobs were open all the time, sometimes on every shift. James England, Vocational Rehabilitation Expert, hired by the Missouri Attorney General representing the Second Injury Fund in the underlying Workers' Com-

pensation case, testified specifically that Plaintiff would not probably be able to do all the types of work she had done at Raskas, but *she could do less hand intensive work*, and *could have been a file clerk or something like that.* James England is not mentioned anywhere in the Appellate Opinion. Petitioner's lawsuit was filed on or about November 23, 1996. Petitioner was not fired until February 1, 1999. Petitioner's lawsuit was not a wrongful discharge case when filed. It was a discrimination case based on facts having nothing to do with wrongful discharge.

Multiple credibility questions arose. Some of the salient ones are: photographs of a pristine bathroom that Defendant's Chris Celeslie testified represented the bathroom in the Summer of 1995, whereas Plaintiff and five independent witnesses testified the bathroom was filthy dirty; motion pictures of a working exhaust fan taken in May 1999, that a ten year employee said was not turned on in May 1999; Defendant's Chris Celeslie's denial of rats directly contradicted by Plaintiff's evidence, plus documentary evidence (Exhibit 14); Defendant said management meetings were held in the Hamilton Warehouse. Bob Emerson, who worked there ten years, said there were never any such meetings held there; Defendant's witness said there was always a lock on the bathroom door, whereas Dave Jones, Defendant's mechanic, put the lock on, at Defendant's orders, well after Plaintiff was transferred there; a phony labeling gun was brought to Court by Defendant.

The Jury returned a Verdict and Judgment was entered for Plaintiff on May 27, 1999 for $360,000.00 actual damages plus $240,000.00 punitive damages. The Missouri Court of Appeals, Eastern District, Opin-

ion is dated June 6, 2000. The Missouri Supreme Court, the Court of last resort in Missouri, refused to Transfer October 3, 2000.

## REASONS FOR ALLOWANCE OF THE WRIT

1. **Whether the legal principle that an Appellate Court cannot adopt its own version of disputed facts to reverse a jury verdict is a federal law applicable to and interwoven in the law throughout the land, and thus an issue reviewable by this Honorable United States Supreme Court.**

The Opinion of the Missouri Court of Appeals, Eastern District, approved by the Missouri Supreme Court, the Court of last resort in Missouri, is in direct conflict with the decision of this Honorable United States Supreme Court in *Cravens v. BlueCross and BlueShield of Kansas City*, 214 F.3d 1011 (8th Cir.2000). *Reeves v. Sanderson Plumbing Products*, United States Supreme Court, 120 S. Ct. 2097, June 12, 2000.

The Petitioner first raised the Federal Questions to the Missouri Court of Appeals, Eastern District, in her Supplement to her Motion for Rehearing, or in the Alternative, Transfer to the Missouri Supreme Court, filed June 30, 2000 (Appendix 35). State Courts are not free from federal authority of the United States Supreme Court when federal law is interwoven with the State Court's decision. *Arizona v. Evans*, 115 S.Ct. 1185, 514 U.S.1. As per *Reeves v. Sanderson Plumbing Products*, United States Supreme Court, 120 S.Ct. 2097, June 12, 2000, federal law is necessarily interwoven with the Missouri Court of Appeals, Eastern District's ignoring the facts found by the jury and setting out its

own set of facts contrary to the evidence.

The U.S. Supreme Court in *Reeves, supra*

> ". . . the general principle of evidence law that the factfinder is entitled to consider a party's
>
> dishonesty about a material fact as 'affirmative evidence of guilt'."

Justice Ginsburg's concurring opinion stated, at 2111:

> "As the Court notes, it is a principle of evidence law that the jury is entitled to treat a party's dishonesty about a material fact as evidence of culpability."

That general principle is not restricted to federal court cases alone, but, as a general principle of law, is applicable throughout the United States, and should be particularly applicable when the question is one of discrimination. The violation of the basic principles of law by the Missouri Court of Appeals, Eastern District, should be reviewable and condemnable by this Honorable Court if justice is to prevail.

This Honorable United States Supreme Court in *Reeves v. Sanderson Plumbing Products, Inc.*, 120 S.Ct. 2097 said at 2031:

> "Ultimate question in *every employment discrimination case* involving a claim of disparate treatment is whether plaintiff was the victim of intentional discrimination."

Admittedly, that was under the Age Discrimination and Employment Act of 1967, 29 U.S.C.A. § 623(a)(1). However, discrimination is not just a local matter, but should be applicable throughout the United States in

every discrimination case.

In *Reeves, supra* this Honorable United States Supreme Court further said at 2034:

> "(prima facie case combined with sufficient evidence to disbelieve employer's explanation always creates jury issue of whether employer intentionally discriminated)"

And further said at 2099:

> "Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge."

And further:

> "Again, the court (appellate) disregarded critical evidence favorable to petitioner–namely, the evidence supporting petitioner's prima facie case and undermining respondent's nondiscriminatory explanation. See 197 F.3d, at 693-694. The court also failed to draw all reasonable inferences in favor of petitioner."

**2. Whether the June 6, 2000 Missouri Court of Appeals, Eastern District, Opinion, in adopting its version of the facts, contrary to that adopted by this jury, and approved by the October 3, 2000 Missouri Supreme Court refusal to Transfer, violated the Due Process Clauses of Article XIV of the Amendments to the United States Constitution.**

The Missouri Court of Appeals, Eastern District, which is in effect the State of Missouri, approved by the

Missouri Supreme Court Order, violated Article XIV, Section 1 of the United States Constitution. As set out in *Reeves v. Sanderson Plumbing Products, Inc.*, 120 S. Ct. 2097, and *Cravens v. Blue Cross and BlueShield of Kansas City*, 214 F3d. 1011 (8th Cir.) (June 7, 2000), and in particular:

1. It abridged the privilege of Plaintiff, a citizen of the United States, to have the jury verdict upheld in her favor.

2. It deprived Plaintiff of the property, namely the $600,000.00 jury verdict without due process of law, when it impermissibly took the place of the fact finding jury and established its own false version of the facts contrary to Plaintiff's evidence.

3. It denied Plaintiff the equal protection of the laws, namely the following laws:

   a. The jury verdict cannot be reversed based upon a different interpretation of facts by an Appellate Court.

   b. The general law interwoven in every case throughout the United States is that credibility of witnesses is for the jury.

   c. Discrimination is a nationwide issue interwoven in this and every decision throughout the United States.

The Missouri Court of Appeals, Eastern District directly violated *Cravens v. BlueCross and BlueShield of Kansas City*, 214 F.3d 1011 (8th Cir.2000) and *Reeves v. Sanderson Plumbing Products*, United States Su-

preme Court, 120 S. Ct. 2097, June 12, 2000, by adopting "facts" not in evidence and contrary to the facts established by Plaintiff and accepted by the Jury Verdict. Employment Discrimination criteria should be uniform throughout the United States and not subject to an Appellate Court's adoption of one Party's oral argument false version of the facts. The Rule of Law that credibility determinations are for the jury should also be enforced throughout the United States. Violation of that fundamental Rule of Law is also a violation of Due Process, assured by the XIV Amendment to the United States Constitution. This Honorable Court further said in *Reeves, supra* at 2032 and 2117:

> "Proof that the defendant's explanation is unworthy of credence is simply one form of circumstantial evidence that is probative of intentional discrimination, and it can be quite persuasive".

Article XIV, Section 1 of the United States Constitution prescribes in pertinent part:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny it to any person within its jurisdiction the equal protection of the laws."

**3. Whether, under the discrimination law of the land, an Employer has an affirmative duty to give an open job to an Employee who can no longer perform certain labor intense jobs, at which she previously worked for 28 years, when she was eminently qualified for opened positions of a clerk, supervisor or instructor.**

In *Cravens v. BlueCross and BlueShield of Kansas City*, 214 F.3d 1011 (8th Cir.) (June 7, 2000) at 6-7.

> "Once Cravens made this request, BCBS was required to initiate an interactive process with her to determine the appropriate reasonable accommodation."

The evidence in the case at bar, Defendant directly violated that requirement for interactive process by cancelling the meeting aimed at determining what jobs that she could do in January 1996. Also, almost on all fours with the case at bar, Cravens pointed out that job openings may not have been posted on the job board in her building, and thus she would not have had an opportunity to see them. Petitioner's evidence in the case at bar shows that a pretended job was never in fact posted and was a sham offer by the Defendant. Therefore, the substance and letter of the general legal principles, which should be applicable whether the discrimination case is brought under the A.D.A. or the Missouri Workers' Compensation Statute, should be applicable throughout the land, including the Missouri Court of Appeals, Eastern District.

## CONCLUSION

The June 6, 2000 Opinion of the Missouri Court of Appeals, Eastern District, should be reversed outright and the Judgment, pursuant to the Jury Verdict, should be entered in favor of Petitioner. Accordingly, a Writ of Certiorari should be issued by this Honorable Court to review the record and so order.

Respectfully submitted,

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December 28, 2000

# APPENDIX

## APPENDIX 1

IN THE CIRCUIT COURT OF THE
CITY OF ST. LOUIS

Cause No. 962-8738

ETHEL STEPHENSON,
*Plaintiff,*

vs.

RASKAS DAIRY, INC.,
Defendant.

JUDGMENT

Honorable Margaret M. Neill

[Ordered: May 27, 1999]

This action came before this Court and a Jury. The parties appeared in person and by their respective attorneys. The issues have been duly tried and the Jury rendered its verdict(s).

### VERDICT A

Whereas, on the claim of Plaintiff, Ethel Stephenson, for discrimination and discharge, against Defendant, Raskas Dairy, Inc., the Jury found in favor of the Plaintiff.

The Jury found the total damages of Plaintiff to be $360,000.00.

WHEREFORE, it is hereby ordered and adjudged that Ethel Stephenson have and recover of Raskas Dairy, Inc. $360,000.00.

**VERDICT B**

Whereas, on the claim of Plaintiff, Ethel Stephenson, for punitive damages, against Defendant, Raskas Dairy, Inc., the Jury found in favor of the Plaintiff.

The Jury found the total damages of Plaintiff to be $240,000.00.

WHEREFORE, it is hereby ordered and adjudged that Ethel Stephenson have and recover of Raskas Dairy, Inc. $240,000.00. Cost of this action to be taxed against the Defendant.

SO ORDERED:
/s/ Margaret M. Neill
Judge, Division No. 4
Judge No. 31612

IN TESTIMONY WHEREOF, I Have hereunto set my hand and affixed the seal of said Court, at office in the City of St. Louis, this 27th day of May, 1999.

MARIANO FAVAZZA
Circuit Clerk

/s/ Melany D. Lane
Deputy Clerk

## APPENDIX 2

IN THE MISSOURI COURT OF APPEALS,
EASTERN DISTRICT

No. ED76698

ETHEL STEPHENSON,
Respondent,

vs.

RASKAS DAIRY, INC.
Appellant.

OPINION

Honorable Sherri B. Sullivan

[Ordered: June 6, 2000]

Raskas Dairy, Inc. (Appellant) appeals from a jury verdict in favor of Ethel Stephenson (Respondent) awarding her $360,000 in compensatory damages and $240,000 in punitive damages for her retaliatory discharge claim against Appellant, her former employer. We reverse.

Appellant is a dairy business, primarily engaged in the production and packaging of cream cheese products. Respondent was employed by Appellant from March 8, 1968 until January 21, 1996, when she was laid off. Pursuant to her union contract, her employment was terminated three years later, on January 21, 1999. During the time Respondent worked for Appellant, she worked in a variety of capacities such as: (1) working on the cream cheese line, which included thirty pound weight lifting, (2) three pound box line, (3) the portion pack, where the pallets weigh thirty to fifty pounds, (4)

the Jones machine, (5) the filler job, (6) shrink wrap, and others.

In 1982, Respondent sustained a ruptured lumbar disc while employed by Appellant, had surgery and was out of work for one year and three weeks. Thereafter Respondent had a permanent medical restriction from doing any work involving lifting more than thirty pounds. Respondent filed a workers' compensation claim for that injury. Respondent testified that she experienced no discrimination or retaliation for that claim. Respondent began experiencing pain and numbness in her wrists in late 1992, and was eventually diagnosed with bilateral carpal tunnel syndrome. Respondent's condition worsened in 1994. On January 10, 1994, Appellant filed a report of a work-related injury with the Division of Workers' Compensation. On May 23, 1994, Respondent had bilateral carpal tunnel surgery, and was off work for eleven weeks. Respondent testified she experienced no discrimination or retaliation up through the time of her surgery. Respondent was granted a workers' compensation leave of absence following her surgery from May through early August 1994.

Respondent returned to work in August 1994. Respondent was released by her physician to work regular duty, with a recommendation that she should be assigned to a lighter job to avoid the possibility of injury to her wrists. On October 6, 1994, Respondent's physician released her to full duty work, with no medical restrictions related to her wrists. Respondent maintained that she was physically unable to do the portion-pack job, the shrink wrap job, the Grade A room job, the turning the cold cheese job, or the job of peeling wrappers off bars of cream cheese which needed to be sent back through the

production line for reprocessing. Eventually, in mid-1995, Respondent informed Appellant's personnel manager that there were no regular dairy-worker jobs that she was able to perform.

Respondent brought in a vocational consultant, HealthSouth Rehabilitation Center (HealthSouth), to study the plant and identify any jobs that Respondent could perform. HealthSouth studied the tasks performed by the various dairy workers at the plant and issued a report on June 23, 1995. The report identified three positions that HealthSouth believed met Respondent's stated medical restrictions. However, Respondent stated she could not perform those jobs.

On April 3, 1995, Respondent filed a workers' compensation claim for permanent partial disability connected with her wrist injury. In June 1995, Appellant assigned Respondent to a lid-labeling job in the Hamilton warehouse across the street from the plant. Appellant claims it sent Respondent to the Hamilton warehouse to perform the lid labeling job because that was where Appellant stored its unused packaging materials. Respondent maintains that the working conditions at the Hamilton warehouse were deplorable, and that Appellant sent her there as retaliation for filing her 1995 workers' compensation claim.

Appellant raises five points on appeal. We find Appellant's first point dispositive of this appeal. In its first point, Appellant maintains the trial court erred in overruling Appellant's Motions for Directed Verdict and for Judgment Notwithstanding the Verdict because Respondent failed to make a submissible case of Workers' Compensation Retaliation under Section 287.780

RSMo (1994),[1] in that an employer may terminate an employee who is unable or unwilling to perform the ordinary duties and responsibilities of her employment. Appellant asserts Respondent herself testified that she was physically unable to perform any job whatsoever at her place of employment and that she had so informed her employer prior to her layoff. When reviewing a failure to grant a directed verdict for the defendant, the evidence is viewed in the light most favorable to the plaintiff, the plaintiff is afforded all reasonable inferences from the evidence, and any of the defendant's evidence that contradicts the plaintiff's claim is disregarded. *Crabtree v. Bugby*, 967 S.W.2d 66, 70 (Mo.banc 1998). If the facts are such that reasonable minds could draw differing conclusions, the issue becomes a question for the jury, and a directed verdict is improper. *Id.* In reviewing the trial court's denial of a motion for judgment notwithstanding the verdict, this court views the evidence in the light most favorable to the nonmoving party and gives that party the benefit of all reasonable inferences. *Wolfe v. Central Mine Equipment Co.*, 895 S.W.2d 83, 87 (Mo. App. E.D. 1995). Granting a judgment notwithstanding the verdict is an extreme measure which should be done only when all of the evidence and reasonable inferences to be drawn therefrom are so strongly against the opponent of the moving party's case there is no room for reasonable minds to differ. *Wolfe*, 895 S.W.2d at 86-87.

Section 287.780 provides:

> No employer or agent shall discharge or in any way discriminate against any employee for exercising

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[1] All further statutory references are to RSMo (1994), unless otherwise indicated.

> any of his rights under this chapter. Any employee who has been discharged or discriminated against shall have a civil action for damages against his employer.

The above statute was enacted into law against the backdrop of the "at will" doctrine, which allows an employer to fire an employee without a durational contract for any reason or for no reason. *Crabtree*, 967 S.W.2d at 70. The workers' compensation act did not abolish the at will doctrine but rather provided a limited exception which allows an action where there was an exclusive causal relationship between the discharge and the employee's exercise of rights as granted under Chapter 287. *Id.* The purpose of the workers' compensation law, including the rule of liberal construction, is to compensate workers for job-related injuries; it is not to insure job security. *Id.* at 72.

To prevail in an action for retaliatory discharge under Section 287.780, a plaintiff must prove four elements: (1) plaintiff's status as an employee of defendant before the injury; (2) plaintiff's exercise of a right granted by the Act; (3) employer's discharge of or discrimination against the plaintiff; and (4) an exclusive causal relationship between plaintiff's actions and defendant's actions. *St. Lawrence v. Trans World Airlines, Inc.*, 8 S.W.3d 143, 149 (Mo. App. E.D. 1999); *Crabtree*, 967 S.W.2d at 70; *Wolfe*, 895 S.W.2d at 87. Appellant challenges the last element. Causation does not exist for purposes of a workers' compensation retaliation claim if the basis for the employee's discharge is valid and nonpretextual. *Wolfe*, 895 S.W.2d at 87. Nothing in workers' compensation law requires an employer to retain an injured employee when he has recovered from

his injuries and is declared able to return to work but cannot or will not perform the duties required by his job. *Id.*

On October 6, 1994, Respondent was released to full duty work, with no medical restrictions related to her wrists. Respondent maintained that she was physically unable to do the portion-pack job, which was her regular job, the shrink wrap job, the Grade A room job, the turning the cold cheese job, or the job of peeling wrappers off bars of cream cheese which needed to be sent back through the production line for reprocessing. Eventually, in mid-1995, Respondent informed Appellant's personnel manager that there were no regular dairy-worker jobs that she was able to perform. Appellant brought in HealthSouth to study the plant and identify any jobs that Respondent could perform. HealthSouth issued a report on June 23, 1995, identifying three positions that HealthSouth believed met Respondent's stated medical restrictions. However, Respondent stated she could not perform any of those jobs.

At this point Appellant gave Respondent the labeling job in the Hamilton warehouse, which involved using a labeling gun to put stickers on the lids of plastic cream cheese tubs. Respondent claims that the Hamilton warehouse was a deplorable place to work, and that she was assigned to the labeling work at the warehouse in retaliation for having filed her workers' compensation claim. Respondent's complaints about working in the Hamilton warehouse included the following:

(1) insects, mice and rats were present in the warehouse;

(2) noise and fumes from the propane-powered forklift trucks;

(3) dust;

(4) Respondent had to go across the street to use the bathroom because the one in the warehouse was unclean, the plumbing was faulty, and the door did not shut and lock completely;

(5) Respondent had to go across the street to retrieve her paycheck; and

(6) the workers at the main plant did not invite Respondent to the Christmas party.

Respondent worked at the Hamilton warehouse the latter half of 1995, and by December 1995, Respondent announced that physically, she could no longer do the lid labeling work and that there were no jobs at Appellant's plant that she could perform.

According to the law set out in *Wolfe*, 895 S.W.2d at 87, Appellant was entitled to terminate Respondent if she was not able to perform her job, or any of the jobs offered to her. Nothing in workers' compensation law requires an employer to retain an injured employee when she has recovered from her injuries and is declared able to return to work but cannot or will not perform the duties required by his job. *Id.* Both Dr. Caplin, Respondent's doctor, and Dr. Ollinger, a surgeon chosen by Appellant to examine Respondent, claimed her carpal tunnel surgery had been completely successful. Dr. Caplin reported that Respondent was able to work with no limitations. However, Respondent insisted that she could not perform any of the jobs at Appellant's dairy. This is a legitimate and nonpretextual

reason to fire Respondent, and it defeats the exclusive causation element.

Respondent claims that Appellant could have offered her a position as an instructor or supervisor. Al Thompson (Thompson), a maintenance mechanic and chief shop steward at the dairy, testified that the instructor job to which Respondent referred was a temporary assignment lasting a few weeks, which was once given to an employee on restricted duty. Thompson testified that it was not a regular or permanent job and had never existed as a regular bid job. That particular employee returned to her regular job after the temporary assignment. In this specific case, Respondent would be unable to similarly return to any regular job because she denied the ability to do any of the jobs at Appellant's plant.

The supervisor position would require a promotion for Respondent, and a loss of her union membership, which Respondent stated she was unwilling to give up. There is no evidence that Respondent ever requested or even thought of a supervisor position until trial. Additionally, Respondent presents no case law supporting an employer's duty to promote its employee when that employee cannot perform her normal duties.

Respondent has not established that the exclusive cause of her termination was the exercise of a right under the workers' compensation law. There is ample evidence that Appellant fired Respondent because she was not able to perform any of the jobs available at Appellant's dairy plant. Respondent insists that Appellant should have created a regular instructor job for her, which was not needed at the plant, or to promote her to supervisor. However, the purpose of the workers' compensation law, including the rule of liberal construction,

is to compensate workers for job-related injuries; it is not to insure job security. *Crabtree*, 967 S.W.2d at 72.

Respondent failed to make a submissible case of discriminatory discharge, in that she did not prove that the exclusive cause of her discharge was the exercise of her workers' compensation rights. On the contrary, she presented ample evidence that she could not, and would not, perform any of the existing jobs at Appellant's dairy, which supported Appellant's reasons for discharging her. Accordingly, we reverse the judgment of the trial court. We decline to address the remaining points on appeal, as Appellant's first point is dispositive of this appeal.[2]

/s/ Sherri B. Sullivan, Judge

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[2] Respondent's Motion to Dismiss is denied.

## APPENDIX 3

IN THE MISSOURI COURT OF APPEALS,
EASTERN DISTRICT

No. ED76698

ETHEL STEPHENSON,
*Respondent,*

vs.

RASKAS DAIRY, INC.,
*Appellant.*

## RESPONDENT'S MOTION FOR REHEARING, OR IN THE ALTERNATIVE, TRANSFER TO THE SUPREME COURT

[Filed: June 20, 2000]

**NOW COMES** Respondent/Plaintiff and hereby moves this Honorable Court for a rehearing under Rule 84.17, or transfer to the Missouri Supreme Court under Rule 83.02, for the following reasons:

1. The June 6, 2000 Opinion, authored by the Honorable Sherri B. Sullivan and concurred in by the Honorable P.J. Crane and the Honorable R.J. Dowd, Jr. of the Court of Appeals, violates numerous existing precedents, including opinions of the Missouri Supreme Court and even other panels of this Eastern District Court of Appeals. The Opinion also overlooked and misinterpreted material matters of law and fact. The departures from well established Missouri jurisprudence include:

(A) What is sufficient to make a prima facie case of Workers' Compensation Retaliatory Discharge under §287.780 RSMo.;

(B) The standard of review of construing the evidence in the light most favorable to the Plaintiff and the verdict and disregarding all of Defendant's evidence, unless it supports Plaintiff's verdict;

(C) That the opinion of a party is not a binding judicial admission, but is capable of contradiction. Not only does the Opinion fail to take into account various facts which supported the verdict, but it included Defendant's version of the facts, which were contradicted by Plaintiff.

(D) Finally, the Opinion fails to recognize the established federal law, that the employer had an affirmative duty albeit, under the American's With Disabilities Act to:

(1) Enter into an interactive process to determine whether reasonable accommodation was possible; and

(2) Transfer Respondent to another available position she could perform within her limitations. The Employer violated these affirmative duties in this case, because Plaintiff exercised her rights under the Workers' Compensation Act.

(E) The fact that the treating physicians in a workers' compensation case are selected by the employer under §287.140.10 RSMo., and as such, do not constitute a physician chosen by the employee;

2. The Opinion of the Court of Appeals, Eastern District, violated and

emasculated the standard of review under Missouri law. Besides failing to note various facts which supported the verdict, which will be discussed in the next paragraphs, the Court also included alleged facts which were propounded by the Appellant, but rejected by the jury. Portions of the Opinion which should have been disregarded, because they didn't support the verdict, include:

(A) "Respondent testified that she experienced no discrimination or retaliation for that claim (referring to the claim she filed for a back injury in 1982, Page 2 of the Opinion)".

There was ample evidence that there was a change in management between the time the first claim was filed and the second claim was filed (Tr-296, 465-466). This fact there was no discrimination in 1982 does not support the verdict and should not be a factor in the decision.

(B) "Respondent testified she experienced no discrimination or retaliation up through the time of her surgery (referring to the 1992 Workers' Compensation claim for bilateral carpal tunnel syndrome and the surgery that occurred in 1994, Page 2 of the Opinion)".

This obviously does not support the verdict, and there is ample evidence that when Plaintiff did file a claim and she was discriminated against. Her claim was filed April 13,

1995 (Tr-132, 245) (Exhibit 1). Defendant's Answer was filed April 27, 1995 (Tr-131, 137-138) (Exhibit 3). She was transferred to the Hamilton Warehouse in June 1995 (Tr-142-143). Clearly, the inclusion of no discrimination before she filed her Workers' Compensation claim violates the standard of review and it should not be a factor in the decision.

(C) "Respondent returned to work in August 1994. Respondent was released by *her* physician to work regular duty, with the recommendation that she should be assigned to a lighter job to avoid the possibility of injury to her wrists. On October 6, 1994, *Respondent's* physician released her to full duty work, with no medical restrictions related to her wrists. (Emphasis ours - Page 2 of the Opinion)."

Clearly, Dr. Caplin was a treating physician, chosen by the Employer under §287.140.10 RSMo. Also, as will be shown in the following paragraph, there were numerous restrictions placed on Plaintiff relative to her bilateral carpal tunnel syndrome, which was known by the company. The inclusion of this fact does not support the verdict, but is contrary to Plaintiff's evidence which does support the verdict.

(D) "On October 6, 1994, Respondent was released to full duty work, with no medical restrictions related to her wrists. Respondent maintained that she was physically unable to do the portion-pack job, which was her regular job, the shrink wrap job, the Grade A room job, the turning the cold cheese job, or the job of peeling

wrappers off bars of cream cheese which needed to be sent back through the production line for reprocessing. Eventually, in mid -1995, Respondent informed Appellant's personnel manager that there were no regular dairy-worker jobs that she was able to perform . . . Respondent worked at the Hamilton Warehouse the later half of 1995, and by December 1995, Respondent announced that physically, she could no longer do the lid labeling work and that there were no jobs at Appellant's plant that she could perform. (Page 5 and 6 of the Opinion)."

Respondent's evidence is that there were jobs which she could perform (Tr-142, 183-184). She simply couldn't perform the specific hand intensive and heavy lifting jobs which the Employer assigned her to. It was and is the Respondent's position that this was done in a deliberate scheme to create a paper trail to hide the real intention, which was to terminate or fire Respondent. Clearly, the Court is considering all of the Appellant's evidence and disregarding Respondent's evidence. As will be shown in the following paragraph, there were definite jobs that were available for Respondent to perform, which were not offered by Appellant. The inclusion of this evidence violates both prongs of the standard of review.

(E) "Al Thompson (Thompson), a maintenance chief shop steward at the dairy, testified that the instructor job to which Respondent referred was a temporary assignment lasting a few

weeks, which was once given to an employee on restricted duty. Thompson testified it was not a regular or permanent job and had never existed as a regular bid job. That particular employee returned to her regular job after the temporary assignment. In this specific case, Respondent would be unable to similarly return to any regular job because she denied the ability to do any of the jobs at Appellant's plant.

The supervisor position which would require a promotion for Respondent, and a loss for union membership, which Respondent stated she was unwilling to give up. There is no evidence that Respondent ever requested or even thought of a supervisor position until trial (Page 7 of the Opinion)."

Only a misinterpretation of the Respondent's evidence suggested that the instructor job was not a permanent job and that it required a promotion. The only mention in the record that an instructor job is not a permanent jobs is a statement by defense counsel as a part of a subsequent disassociated question asked by defense counsel and never answered by Alvin Thompson (Tr-413). Plaintiff's evidence, which will be shown in the succeeding paragraph, was that this was a permanent position. Since this is adequately described in the next paragraph, it shall not be repeated here. With regards to the promotion, this was the Appellant's version of the evidence, and it should be disregarded, unless it supports the verdict.

(F) "There is ample evidence that Appellant fired

Respondent because she was not able to perform any of the jobs available at Appellant's dairy plant. Respondent insists that Appellant should have created a regular instructor job for her, which was not needed at the plant, or to promote her to supervisor. (Page 8 of the Opinion)."

Clearly, once again, this is the Appellant's version of the evidence. Respondent not only tendered the always open instructor job (Tr-181-182), but indicated other jobs she could have performed at the plant (Tr-183-184). Mr. Thompson testified:

"Q. The job of an instructor is an ongoing job. It's available at Raskas Dairy and needed to train people how to work machinery and how to handle the cheese, right? Or is it?

A. An instruction job would be for the temporary people because they're always coming in. They are only staying there for a few weeks and then you get a new group in.

Q. They're there. They keep them as temporary?

A. Right.

Q. *But is the need there all the time?*

A. *Yes, someone has to be there to show them what to do, yes.*

. . .

Q. What, if any, years experience have to do with being a qualified instructor?

A. As far as that job, yes, she would have been qualified for that.

Q. Preeminently qualified, isn't she?

A. Yes. Yes."

The Opinion uses only the Appellant's evidence to justify a non-pretextual reason of terminating Respondent. This is not permissible under Missouri Law in reviewing a verdict for Plaintiff.

The Opinion erroneously states that if you are assigned a job as an instructor, you lose your seniority. That is not Respondent/Plaintiff's evidence, and is in fact contrary to Plaintiff's evidence. Alvin Thompson specifically testified you do not lose your seniority, when you get an instructor job (Tr-392, Lines 13-17), as follows:

"Q. . . . But do you lose your seniority if you get a job as an instructor?

A. The job, no. No.

Q. You keep your seniority?

A. Correct."

The Opinion says an instructor was a temporary job. There is no such evidence anywhere in the record. Al Thompson testified they gave a lady "that job to do" referring to an instructor job because she was on restricted duty (Tr-393). Following that testimony the following questions and answers are in the transcript:

"Q. But the point is they had a job and they put a woman in it?

A. Yes.

Q. Okay. Was that job ever offered to Ethel Stephenson?

. . .

Q. Was that job ever offered to Ethel Stephenson in January 1996 or December of '95?

A. No." (Tr-394)

Nowhere, is there any evidence from anyone that an instructor job was a temporary position. On Page 424 Al Thompson was asked the following question:

"Q. Okay. And so that makes it different from the woman who had the temporary job doing the -- doing the instructing because she got better and was able to return to full duty, right?

A. Yes, when she was healed, yes, she did return to her regular job."

Nowhere does that say the job was always a temporary job, but the question is couched carefully about the particular woman for whom it was a temporary job because she got better and was able to return to full light duty. The Opinion obviously misinterprets the evidence and makes the evidence what it is not. The Opinion misinterprets "the temporary", because "temporary" here applies to the people who are being instructed, not the instructor. The need for the instructor is there all the time, and Plaintiff was pre-eminently qualified for that job (Tr-426). Furthermore, on recross-examination, Alvin Thompson said the temporaries are called casual workers and the following transpired (Tr-427):

"Q. And they bring in the casual workers, now the causal workers have their own lead person?

A. I do believe they do. Yes, they do.

Q. All right. And that's the person who's in charge of supervising the group of casual workers, right?

A. That's the one person that come, usually takes around and show where all the supplies are so that they don't have to do it, and that person would show their group what to do and where to take the supplies, where to find chairs, where to put their buckets.

Q. Uh-huh.

A. All of these kinds of things.

Q. So how much time do you think it would take, ten minutes, fifteen minutes, half an hour, to show the casual workers where the chairs are, where the buckets are and where the cheese is?

A. I don't know how much time the lead the person spends as far as instructing all of them, but I do know that that lead person is there all day with them, yes."

The Opinion ignores Plaintiff's evidence as follows, regarding her position in January 1996 (Tr-181):

"Q. But a supervisory job, could you have done that if they had offered it to you?

A. Yes.

Q. Was any offered to you?

A. No.

Q. Were they available?

A. Yes.

Q. Okay. How many different supervisors did they have in that plant?

A. They had - - When I was there, they had about maybe four or five, but they also had *instructor jobs* because they have casuals that come in and they have to have people to instruct them on what to do, what's good and bad in the cheese, whats the labels, how they're sealed, how to peel it out, how to salvage it, you know.

Q. How many of those jobs did they have in 1996, January, approximately?

A. *They have them all year. Sometimes on every shift."* (Tr-181-182)

Plaintiff further testified the company had light duty jobs that other people were doing, other than supervisor and instructor. She described those jobs just putting stickers on boxes without using the guns, and there were people doing those jobs at that time, but they were never offered it her (Tr-183-184). The opinion completely omits any reference to this testimony, which should have been adopted as the evidence and the light most favorable to the Plaintiff and accepted by the jury.

3. Respondent's evidence established numerous material facts which were completely overlooked by the Opinion. As established by decisions of separate panels of this Court and the Supreme Court, a fact finder could have concluded that the Employer acted intentionally

or maliciously by engaging in a pattern of harassment, by intentionally creating a false paper trail to cover its scheme to fire her. These overlooked material facts include:

(A) Transferring Plaintiff, a 28 year Employee, to the Hamilton Warehouse within six weeks after the Answer to the Claim for Compensation was filed (Tr-132, 142-143, 145) (Plaintiff's Exhibit 1, 2, & 3) (Respondent's Brief A-2, A-3, A-4). Plaintiff's evidence showed that commencing with Plaintiff and Ralph Atkins, it was the policy of the Defendant, under new management (Tr-296, 465-466), to transfer employees who filed Worker' Compensation claims to the Hamilton Warehouse (Tr-228, 243, 463).

(B) Defendant's management was quoted as saying its lawyers told them to get rid of Plaintiff (as an Employee) (Tr-401-402), and Defendant didn't find a job for Plaintiff because basically they did not want her back at the plant (Tr-413). That was the reason Defendant never "found a job" for Plaintiff (Tr-413). Defendant's lawyers only became involved after the Workers' Compensation claim was filed.

(C) Assigning Plaintiff as the sole female employee to work in the Hamilton Warehouse (Tr-141, 149, 305-316, 437, 473), which had deplorable conditions. This entailed for more than what was described by the Court in its opinion. She had to eat with rats, flies, and roaches (Tr-144, 221-222, 304-305, 327, 329, 337-338, 368, 404, 429, 431). The Hamilton Warehouse was

described by another worker as a dungeon (Tr-332). The was only one restroom for Plaintiff to use in this particular Warehouse. There were holes in the door, such that Plaintiff, the only female Employee in this Warehouse, would have absolutely no privacy. Plaintiff had to walk through a men's locker room to even get to the bathroom (Tr-153-155). She was the only female Employee at the plant to be assigned to this Warehouse, and it was within six weeks after Defendant its Answer to Plaintiff's Workers' Compensation claim (Tr-132, 245) (Exhibit 1) and (Tr-134, 137-138) (Exhibit 3).

(D) Requiring Plaintiff to do the same work she was doing in the C Building (labeling) and/or even heavier work (Tr-141-142, 145-146), in violation of her medical restrictions for post surgery bilateral carpal tunnel syndrome and operated herniated disc (Tr-160-162, 273-274). Those restrictions were no lifting over 30 lbs. and no repetitious use of the hands and wrists (Tr-175-177, 346-347, 352). In fact, the Employer's January 17, 1996 termination letter stated they allegedly could not find a position "that met your restrictions" (Plaintiff's Exhibit 4; Plaintiff's Brief A-5). The work at the Hamilton Warehouse so adversely affected her hands and arms, that she became known as "Popeye arms" (Tr-371, 384). With regard to restrictions from the bilateral carpal tunnel syndrome, that issue has already been litigated between the parties. The Labor and Industrial Relations Commission has exclusive jurisdiction for determining the nature

and extent of disability a claimant has from a work-related occupational disease, such as carpal tunnel syndrome, §287.490 RSMo. It is undisputed this Plaintiff had a specific permanent partial disability due to bi-lateral carpal tunnel syndrome. This was litigated between these same parties, and that issue is res judicata. Therefore, as a matter of law, Plaintiff had restrictions referable to both wrists. The question of an opinion of whether she perform certain jobs at Appellant's Dairy with those permanent restrictions is a matter of opinion for the jury. There was clear evidence of opinions at trial that there were various positions she could perform, and as such, the jury had ample evidence to decide this issue in favor of Plaintiff and that there was no existing nonpretextual reason for terminating Plaintiff. Therefore, there is evidence of an exclusive causal relationship between Plaintiff's exercise of her rights under the Workers' Compensation Act and Defendant's discriminatory treatment and termination of Plaintiff.

(E) Requiring Respondent to walk across the street to get her paycheck, whereas every other Employee in the Hamilton Warehouse had their paychecks delivered (Tr-150-152, 226, 290-291, 311, 319, 363, 402, 404, 434, 478-479, 498).

(F) Requiring Plaintiff to keep a daily record of the work she performed in the Hamilton Warehouse, which was something she had never done in 28 years of employment (Tr-165, 167).

(G) A supervisor, Steve Schmidt, chided her about the poor production she was doing, while snatching a labeling gun from her (Tr-166).

(H) Refusing to buy a better labeling gun to use for the job of labeling 2,500 lids a day, which caused tremendous flexion and extension of the wrist, in violation of her medical restrictions (Tr-167).

(I) Canceling a meeting to discuss what jobs she could do in the company, when she insisted on her legal right to have her worker's compensation attorney present at that meeting, especially since the claims adjustor handling her claim, the plant manager, and Defendant's Employee Relations Manager were to be present at that meeting (Tr-169-170, 698-700). Shortly thereafter she was laid off (Tr-171-172). This is not only a material fact ignored by the Opinion, but clearly is a direct flagrant violation of the federally established duty of an employer to cooperate with the injured person to find a position that person can fill. Also, the same failure of the Employer to meet with the Employee to discuss positions existed in the Cravens case (L.C. 6-7).

(J) Giving her a layoff, because she could not do three jobs, which violated her work restrictions, and one of which she was previously refused because of her weight lift restrictions, when in truth and in fact, other jobs she could have done were available at the time (Tr-146, 173-182, 201-205, 265, 395-399).

(K) Giving her a belated false bid for a job that was never posted, as required at the Defendant's place of employment. In short, a phony job offer (Tr-188, 300, 391, 405-406).

(L) Firing her, when she, in fact, could have worked as a supervisor or an instructor, or done light duty work at Defendant's place of employment, all of which were open jobs all the time. The evidence is she could put stickers on, as that was light-duty work (Tr-183). Furthermore, she could work as a supervisor or an instructor (Tr-141-142, 181-182). She explained that the instructor would continuously instruct casuals, who were coming and going (Tr-142). That does not mean the instructor was coming and going, but the casuals were coming and going. So in answer to Judge Sullivan's question during oral argument, there is specific evidence that the instructor job was a permanent position, although the word "permanent" was not used. Instead, the terminology used was that job was available (Tr-142) or always open (Tr-181-185, 393-394, 426). There is no substantive difference between "permanent" and "always open".

4. It is clear when the verdict is considered according to the well established standard of review of disregarding the facts that do not support the verdict and including these additional facts which do support the verdict, the Opinion of the Missouri Court of Appeals, Eastern District, is completely contrary to other opinions from other panels of this Court and the Missouri Supreme Court. Clearly, this very Eastern Dis-

trict Court of Appeals has reversed summary judgment in a §287.780 RSMo. discrimination case, holding that a pattern of discriminating acts can, if proven, prove a discrimination action in violation of this section. Also, the Supreme Court has clearly described that an employer, acting intentionally or maliciously by engaging in a pattern of harassment or by intentionally creating a false paper trail to cover its scheme to fire an employee, is actionable. That is exactly what occurred in this case. The Opinion basically disregards these established precedents of this Court and of the Missouri Supreme Court. The Opinion basically adopts the false paper trail as the facts. The jury verdict should be upheld, as there is more than ample evidence to support it under the existing case law.

5. Next, the Opinion falsely indicates that Respondent indicated there were no jobs she could perform, and uses this as a judicial admission to indicate that judgment, notwithstanding the verdict, should have been granted to the Appellant. Besides the fact that this determination of fact is erroneous, this is a mis-statement of law. Clearly, whether Respondent could or could not perform any job at the Hamilton Warehouse, is a matter of opinion. In Missouri, a statement of a party as to an opinion, is not binding and controlling. In this case, Alvin Thompson said that on light duty, they find something for you to do (Tr-422). He also said you do not base your seniority when you get an instructor job (Tr-392), and an instructor job is in need all the time (Tr-181-182). Specifically, the most credential person to testify at the trial, was James England, Vocational Rehabilitation Expert. He was hired by the Missouri Attorney General representing the Second Injury Fund in the underlying Workers' Compensation case. He

testified specifically that Plaintiff would not probably be able to do all the types of work she had done at Raskas (Tr-346), but she could do less hand intensive work (Tr-347), and could have been a file clerk or something like that (Tr-354). It is more than interesting that James England is not mentioned anywhere in the Court's Opinion.

6. §287.780 and the verdict directing Instruction No. 7 given in this case, following said Section, does not limit the discrimination to discharge, but specifically says, "No employer or agent shall discharge or in any way discriminate against any employee for exercising any of his rights under this chapter." The word "or" is in the disjunctive. The opinion limited itself entirely to the discharge of Plaintiff, whereas Missouri law is not so limited. At least *13* different acts of discrimination were proven under the evidence by the Plaintiff, but the Appellate Court utterly failed to deal with those. Under §287.780 and Instruction No. 7 , (Legal File 95), the jury was correct in awarding the damages it did against the Defendant. Had the Defendant never fired Plaintiff three years later, this verdict would still stand under the law.

7. Material matters of law were completely overlooked by the Appellate Court because the credibility of Appellant/Defendant's witnesses was for the jury to decide, and as a matter of law, the Court of Appeals cannot replace its credibility determination of live witnesses for that of the jury. As a matter of fact, the facts were actually misconstrued and mis-stated, by the Appellate opinion to the affect that on October 6, 1994, Respondent/Plaintiff was released to full duty work. The evidence is that Plaintiff was required to lift heavy

boxes, make cartons from heavy cardboard, and use an old labeling gun as much as 2,500 times a day. She became known as "Popeye arms" because of the work in the Summer and Fall of 1995 at the Hamilton Warehouse, contrary to medical restrictions put upon her, and that made her unable to do the only three jobs Defendant ever offered her prior to her layoff in January 1996.

8. The opinion is self contradictory in saying that Respondent was released to full duty work, with no medical restrictions related to her wrist, and further on in the same paragraph, pointing out that HealthSouth was brought in by Appellant to study the plant and identify any jobs that Respondent could perform. Thereafter, HealthSouth issued a report dated June 23, 1995, identifying three positions that HealthSouth believed met Respondent's *stated medical restrictions*. The opinion is therefore self contradictory and omits its own finding that in June of 1995, there were in affect "stated medical restrictions on Plaintiff's work". It also ignores the fact that all three HealthSouth's positions, by their nature, precluded Plaintiff from doing them, and in fact, she had been rejected from one of those jobs years previously because of a ruptured intervertebral disc. Furthermore, the HealthSouth report was a question of credibility and was subject to being rejected by the jury. The opinion states that Respondent announced that physically there were no jobs she could perform at Appellant's plant. That is not the evidence. The evidence is there were no jobs with her wrists and hands that she could perform at Appellant's plant due to the hard work given to her by Appellant. In fact, under the American's With Disabilities Act, the Employer had an affirmative duty to offer her work, including other

positions, which she could perform. That duty was broken by Appellant in this case because Respondent exercised her rights under the Missouri Workers' Compensation Act. This is what the jury decided, and there is evidence to support it. This is discrimination that led to Claimant's discharge.

9. The Opinion states that according to the law, Appellant was entitled to terminate Respondent if she was not able to perform "her job or any of the jobs offered to her". That is not the law. The law is, to the contrary, if she is unable to perform any job (not due to the acts and conducts of the Employer), then the Employer is able to terminate the Respondent. However as written, the opinion allows the Employer to offer Respondent back her jobs or "any of the jobs it chooses to offer", knowing she could not do them, and then use that as a basis to fire her. That is not and should not be the law of Missouri or any other jurisdiction. It is contrary to the spirit and meaning of §287.780 RSMo. and the case law interpreting that statute.

10. The Opinion ignores the fact that both Dr. Caplin and Dr. Ollinger were chosen physicians of the Employer and their credibility, like that of any other witness, was for jury questioning. Linda Mullinger, the claims adjuster from Corporate Claims Management, Inc. handling the case, sent Plaintiff to Dr. Ollinger on January 5, 1996. She scheduled that exam January 2, 1996 (LF-61-62).

11. Contrary to the Opinion, Respondent never did say she could not perform any jobs at Appellant's Dairy. To the contrary, she said she could do a job as an instructor (Tr-142) or a supervisor, or put stickers on boxes without using the labeling gun, but those jobs

were never offered by Appellant (Tr-183-184). Appellant had a duty to offer those jobs under federal law, and Appellant breached that duty because Respondent exercised her Missouri Workers' Compensation rights.

12. The Opinion completely overlooks the evidence that Respondent was transferred to the Hamilton Warehouse because she filed or pursued her Workers' Compensation Claim. The opinion overlooks the credible evidence, adopted by the jury verdict, that Raskas Dairy assigned Respondent Ethel Stephenson to extremely difficult work, contrary to her medical restrictions, so as to make her unable to discriminate against her lid labeling job to do those jobs. No case law in Missouri permits an Employer to render an Employee non-functional for physical jobs with hands or wrists, or any other portion of the body, refuse to give her an open light duty job, and then be able to lay her off and subsequently fire her. That is what the evidence shows Defendant did in this case. Respondent lost the ability to repeatedly use her wrists due to her work for Appellant in the Summer, Fall, and Winter of 1995. Thereafter, Appellant only offered her jobs she couldn't do and not other available jobs she could do. The Opinion sets a terrible new precedent, in that, it allows that action, which this jury condemned by its verdict in favor of the Plaintiff. Not only did the jury decide that the Employer so acted, but it awarded punitive damages, deciding that Employer's actions were evil.

13. The case should be transferred to the Supreme Court because of the extreme general interest and importance of an Appellate Court setting itself up as a finder of facts, overriding the jury's function. That is precisely what the Appellate opinion did in this case. It

is contrary to the law set out by the Missouri Supreme Court, en banc, in *Crabtree v. Bugby*, 967 S.W.2d, (Mo banc 1998) and *Hansome v. Northwestern Cooperage Company*, 679 S.W.2d 273 (Mo.banc 1984), that Plaintiff is afforded all reasonable inferences from the evidence, and any Defendant's evidence that contradicts the Plaintiff's claim is disregarded, and that if the facts are such that reasonable minds could differ drawing different conclusions, the issue becomes a question for the jury and directed verdict is improper. Plaintiff's testimony alone, even if contradicted by the Defendant's evidence can be enough to support a retaliatory discharge claim. The Opinion adopts the arguments of the Employer, overlooking and rejecting the contrary evidence of the Employee, and that is contrary to Missouri law. Also, under Federal law specifically the Americans With Disabilities Act, the Employer had an affirmative duty to assist the Respondent in attempts to find an alternative position she could perform and then offer her that position. The Opinion places that duty on the Employee to find the job on her own and then demand it. This is an erroneous new pronouncement of Missouri law. If it is to be the new law in Missouri, it should come from the Missouri Supreme Court.

WHEREFORE, Respondent/Plaintiff hereby moves this Honorable court of Appeals to withdraw its horrendously, erroneous opinion because of its erroneous misinterpretation of the clean factual evidence considered in the light most favorable to Plaintiff and affirm the Judgment or in the alternative transfer this case to the Missouri Supreme Court so it can reverse the horrendously erroneous opinion and re-instate the Judgement in accordance with *Crabtree v. Bugby*, 967 S.W.2d

66 (Mo.banc 1998), *Hansome v. Northwestern Cooperage Company*, 679 S.W.2d 273 (Mo.banc 1984), and §287.780 RSMo.

/s/ Ray A. Gerritzen,
Attorney for Respondent

## APPENDIX 4

IN THE MISSOURI COURT OF APPEALS,
EASTERN DISTRICT

No. ED76698

ETHEL STEPHENSON,
Respondent,

vs.

RASKAS DAIRY, INC.
Appellant.

## SUPPLEMENT TO MOTION FOR REHEARING, OR IN THE ALTERNATIVE, TRANSFER TO THE SUPREME COURT

[Filed: June 30, 2000]

**NOW COMES** Respondent/Plaintiff and hereby moves this Honorable Court to supplement Respondent/Plaintiff's Motion for Rehearing, or in the Alternative, Transfer to the Supreme Court, by referring this Court to *Reeves v. Sanderson Plumbing Products*, United States Supreme Court, Decision June 12, 2000, No. 99-536, which in pertinent part states:

" the Court of Appeals impermissibly substituted its judgment concerning the weight of the evidence for the jury's"

That is precisely what the Appellate Opinion has done in the case at bar.

/s/ Ray A. Gerritzen,
Attorney for Respondent

## APPENDIX 5

IN THE MISSOURI COURT OF APPEALS,
EASTERN DISTRICT

No. ED76698

ETHEL STEPHENSON,
Respondent,

vs.

RASKAS DAIRY, INC.
Appellant.

## ORDER DENYING MOTION FOR REHEARING AND/OR TRANSFER

[Ordered: August 15, 2000]

RE: Motions For Rehearing And/Or Transfer To Supreme Court Denied

4. ED76698 ETHEL STEPHENSON, RES V RASKAS DAIRY, INC. APP.

## APPENDIX 6

## IN THE SUPREME COURT OF MISSOURI

No. SC82980

ETHEL STEPHENSON,
Respondent,

vs.

RASKAS DAIRY, INC.
Appellant.

## APPLICATION FOR TRANSFER

[Filed: August 25, 2000]

**NOW COMES** Respondent/Plaintiff and hereby applies to the Honorable Missouri Supreme Court for transfer under Rule 83.05, Missouri Rules of Civil Procedure for the following reasons:

## QUESTIONS

1. Did the Opinion violate the standard of review for reviewing the Plaintiff's $600,000.00 verdict, approved by the trial court? The Opinion properly quoted the standard of review, but failed to follow it.

2. Is the Opinion contrary to previous Appellate Decisions, including the Missouri Supreme Court, En banc, concerning evidence necessary to sustain a Plaintiff's verdict in discrimination cases?

3. Is the Opinion dealing only with discharge, in direct conflict with §287.780 RSMo., in that, "discharge or in any way discriminate" is all that is necessary to sustain a Plaintiff's verdict?

4. It is of general interest and importance whether the federal discrimination, standard of review, and duty of an employer should differ from Missouri. *Reeves v Sanderson Plumbing Products, Inc.*, 120 S.Ct. 2097 (June 12, 2000)requires review of those issues by the Missouri Supreme Court.

5. It is of general interest and importance whether an employer can selectively demand an employee perform certain jobs only and then discriminate against that employee because he or she cannot physically perform those jobs, although other "light duty" jobs are available.

## FACTS

1. Ethel Stephenson was born January 23, 1945. She went to work March 8, 1968 for Raskas Dairy, where she continued to work until layed off January 17, 1996. She worked on practically every job at Raskas Dairy. In 1982, she sustained a ruptured lumbar disc at the Dairy for which she had surgery. She was out of work one year and three weeks. She returned to work and worked continuously until May 23, 1994, when she had bi-lateral carpal tunnel syndrome surgery by the Workers' Compensation surgeon. She was then off of work for eleven weeks and returned in August 1994, working in the C Plant. She received treatment for bi-lateral carpal tunnel syndrome until February 1995. Plaintiff filed her Workers' Compensation Claim April 3, 1995, which the Division acknowledged April 11, 1995. Defendant's Answer was filed April 27, 1995. In early June 1995, Plaintiff, then number two on the Seniority List, along with Ralph Atkins, was sent to the Hamilton Warehouse. Ralph Atkins had also just filed a Workers' Compensation Claim. A whole different group of people

were in management control at Raskas in 1995 than in previous years. It became common knowledge that Plaintiff was transferred to the Hamilton Warehouse because she filed a Workers' Compensation Claim. Within the first three months, after Plaintiff was assigned to the Hamilton Warehouse, she had to work on the second floor, making thick cardboard boxes by hand and stack them on skids. Noise and fumes from forklifts were everywhere, and she could hardly breathe, to the point she had to have an inhaler because of the fumes. She developed huge swelling and pain in her hands. Her co-workers referred to her as "Popeye Arms". Plaintiff was layed of in January 1996 and finally fired February 1, 1999. The jury awarded $360,000.00 actual, plus $240,000.00 punitive damages. The trial court denied all Defendant's post trial motions, including for Judgment N.O.V. and for New Trial.

## GROUNDS FOR TRANSFER

1. In reviewing the submissibility of a wrongful discharge case under Chapter 287, it is the duty of the Appellate Court to consider the evidence in the light most favorabie to the Plaintiff, give Plaintiff the benefit of all inferences reasonably drawn from the evidence, and disregard Defendant's evidence that does not support Plaintiff's case. *Crabtree v. Bugby*, 967 S.W.2d 66 (Mo.banc 1998); *Henderson v. St. Louis Housing Authority*, 605 S.W.2d 800 (Mo.App.1979). Under *Hansome v. Northwestern Cooperage Company*, 679 S.W.2d 273 (Mo.banc 1984), failure to follow the standard of review is grounds for transfer to the Missouri Supreme Court, which then reviews the case as an original appeal under Article V, Section 10 of the Missouri Constitution. The Opinion expressly adopted Defendant's evidence, which

did not support the verdict. It also overlooked and misconstrued the following evidence, which supported the verdict under *Crabtree*, *Henderson*, *Hansome, supra*, *Coleman*, 967 S.W.2d 509 (Mo.App.E.D.1998), and *Ralph*, 979 S.W.2d 509 (Mo.App.S.D.1998) and individually and collectively are a sound legal basis to uphold the jury verdict:

(A) Transferring Plaintiff, a 28 year Employee, second on the Seniority List, to the Hamilton Warehouse within six weeks after the Answer to the Claim for Compensation was filed. An independent witness, Bob Emerson, testified it was general knowledge, that starting with Plaintiff and Ralph Atkins, Defendant sent people to the Hamilton Warehouse when they filed Workers' Compensation Claims. When transferred, Plaintiff could have worked as an instructor or supervisor, which is not manual labor, or could have put on stickers by hand, rather than use a labeling gun.

(B) Defendant's lawyers said to get rid of Plaintiff, and that was the reason Defendant never "found a job" for her. Obviously, Defendant's lawyers only became involved after the Workers' Compensation claim was filed. In *Hansome, supra*, Judge Blackmar wrote, at 277: "The plaintiff's case absolutely depends on his initial conversation with the foreman when he inquired about the reason for his discharge."

(C) Assigning Plaintiff as the sole female employee to work in the Hamilton Warehouse, which had deplorable conditions, described as a dungeon.

(D) To get to the bathroom, Plaintiff had to go through the men's locker room. One time a trucker walked in on her. There was no lock on the door, no soap, no towels, a hole in the door, and the commode did not flush properly. The whole bathroom was filthy. One worker said that bathroom was not fit for a lady to use. Because the bathroom was so deplorable, Plaintiff had to walk across the street in all kinds of inclement weather, use an entry card, and then a combination lock to get to the main plant, where she had to walk some distance to the bathroom.

(E) Contrary to Defendant's position, Defendant required Plaintiff to do the same work she was doing in the C Building (labeling) and/or even heavier work of 2,500 labels per day, in violation of her medical restrictions of no lifting over 30 lbs. and no repetitive use of the hands and wrists.

(F) Requiring Plaintiff alone to walk across the street in all kinds of weather to get her weekly paycheck, whereas every other Employee in the Hamilton Warehouse had their paychecks delivered.

(G) For the first time in 28 years, requiring Plaintiff to keep a daily record of the work she performed.

(H) A supervisor chided her about the poor production she was doing, while snatching a labeling gun from her .

(I) The foreman told Plaintiff this $30,000,000.00 company, with 350 employees, could not afford $30.00 to buy a better labeling gun to use for the job of labeling 2,500 lids a day.

(J) Canceling a meeting to discuss what jobs she could do in the company, when she insisted on her legal right to have her worker's compensation attorney present. The meeting was to be held with Chris Celeslie, the company's Employee Relations Manager, the Plant Manager, and the claim's manager handling her Workers' Compensation Claim. Within a short time thereafter, she was layed off. See *Cravens v. BlueCross and BlueShield of Kansas City*, 214 F.3d 1011 (8th Cir.) (June 7, 2000) at 6-7.

(K) Giving her a layoff in January 1996 because she could not do three jobs, which violated her work restrictions, and one of which she was previously refused because of her weight lift restrictions, all when other light duty jobs she could have done were available. On January 17th, Plaintiff was layed off with a letter that says there was no position open Plaintiff was capable of doing, given her present physical work restrictions. The letter said they continued her on light duty, but Plaintiff vehemently denied that.

(L) Giving her a belated false bid for a job that never really existed on March 13, 1997. That occurred on the second day of the presentation of her evidence at the Division of Workers' Compensation.

(M) Firing her, when she, in fact, could have worked as a supervisor or an instructor, or done light duty work at Defendant's place of employment. The Opinion erroneously states Thompson described this as a temporary job. Plaintiff's evidence was supervisor jobs were open all the time, sometimes on every shift.

(N) James England, Vocational Rehabilitation Expert, hired by the Missouri Attorney General representing the Second Injury Fund in the underlying Workers' Compensation case, testified specifically that Plaintiff would not probably be able to do all the types of work she had done at Raskas, but she could do less hand intensive work, and could have been a file clerk or something like that. James England is not mentioned anywhere in the Appellate Opinion.

(O) Ignoring credibility questions. Some of the salient ones are: photographs of a pristine bathroom that Defendant's Chris Celeslie testified represented the bathroom in the Summer of 1995, whereas Plaintiff and five independent witnesses testified the bathroom was filthy dirty; motion pictures of a working exhaust fan taken in May 1999, that a ten year employee said was not turned on in May 1999; Chris Celeslie's denial of rats directly contradicted by Plaintiff's evidence, plus documentary evidence (Exhibit 14); Defendant said management meetings were held in the Hamilton Warehouse. Bob Emerson, who worked there ten years, said there were never any such

meetings held there; Defendant's witness said there was always a lock on the bathroom door, whereas Dave Jones, Defendant's mechanic, put the lock on, at Defendant's orders, well after Plaintiff was transferred there; a phony labeling gun was brought to Court by Defendant. *Poluski v. Richardson Transportation*, 877 S.W.2d 709 (Mo.App.E.D.1994) said: "Credibility is for the jury to determine." The U.S. Supreme Court in *Reeves v Sanderson Plumbing Products, Inc.*, 120 S.Ct. 2097 said, at 2107:

> "... the general principle of evidence law that the factfinder is entitled to consider a party's dishonesty about a material fact as 'affirmative evidence of guilt'."

2. The *Opinion* is *contrary to Missouri Supreme Court previous opinions* of *Crabtree v. Bugby*, 967 S.W.2d 66 (Mo.banc 1998); *Henderson v. St. Louis Housing Authority*, 605 S.W.2d 800 (Mo.App.1979); *Hansome v. Northwestern Cooperage Company*, 679 S.W.2d 273 (Mo.banc 1984); and *Coleman v. Winning*, 967 S.W.2d 644 (Mo.App.E.D.1998). *Ralph v. Lewis Brothers Bakeries, Inc.*, 979 S.W.2d 509 (Mo.App.S.D.1998). This Decision is in complete conflict with *Crabtree, supra*: "Viewed in the light most favorable to Crabtree, the factfinder could have concluded that Silver Maple Farm acted intentionally or maliciously by engaging in a pattern of harassment or by intentionally creating a false paper trail to cover its scheme to fire her." That is the evidence as shown in paragraph 1 above, the jury properly relied on.

3. The Opinion is in *direct conflict with §287.780 RSMo.*, and *the case law* thereunder, in that, wrongful

discharge is not necessary in a discrimination case, and the case at bar has many discriminatory factual situations herein specified, which individually and collectively sustain the verdict for Plaintiff, although getting rid of Plaintiff was the Defendant's ultimate goal. Can an employer, with impunity, repeatedly harass an employee, because they exercised their rights under the Missouri Workers' Compensation Act. This has an effect on all of Missouri's work force? §287.780 and the verdict directing Instruction No. 7 given in this case, following said Statute, does not limit the discrimination to discharge, but specifically says, "No employer or agent shall discharge or in any way discriminate against any employee for exercising any of his rights under this chapter." The word "or" is in the disjunctive. The opinion limited itself entirely to the discharge of Plaintiff, whereas Missouri law is not so limited. At least *14* different acts of discrimination plus a lying Defendant, as shown above in paragraph 1, were proven under the evidence, but the Appellate Court utterly failed to deal with those. Under §287.780 and Instruction No. 7, the jury was correct. Had the Defendant never fired Plaintiff, this verdict should still stand.

4. It is of overwhelming *general interest and importance* whether the standard of review and duty of an employer for establishing discrimination under §287.270 RSMo. should be different than recently established by the United States Supreme Court in *Reeves v. Sanderson Plumbing Products, Inc.*, 120 S.Ct. 2097 (June 12, 2000). The U.S. Supreme Court recently adopted a standard for reviewing the submissibility of discrimination cases and review of verdicts in discrimination cases, and this Court has not had an opportunity to say whether said standard should be adopted in Missouri. In *Reeves*, the

Supreme Court reviewed a jury verdict in favor of an employee in an Age Discrimination Employment Act case. The Fifth Circuit had reversed the case. The Supreme Court specifically found in a unanimous Opinion that the Fifth Circuit had misconceived the evidentiary burden born by Plaintiffs. *Reeves, supra* at 2101. The Court specifically held at 2102: "It suffices to say that a plaintiff's prima facie case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated." The United States Supreme Court further said, at 2101: "In holding that the record contained insufficient evidence to sustain the jury's verdict, the Fifth Circuit misapplied the standard of review dictated by Rule 50. The court disregarded evidence favorable to Reeves–the evidence supporting his prima facie case and undermining respondent's nondiscriminatory explanation–and failed to draw all reasonable inferences in his favor." See also *Cravens v. BlueCross and BlueShield of Kansas City*, 214 F.3d 1011 (8th Cir.) ( June 7, 2000); and *Fjellestad v. Pizza Hut of America, Inc.*, 188 F.3d 944 (8th Cir. 1999). The Employer has an affirmative duty to enter into an interactive process, to transfer Respondent to another available position she could perform within her limitations. The jury, as a fact finder, has the right to decide if the Employer violated that affirmative duty. The United States Supreme Court said in *Reeves, supra* at 2113: "the Court of Appeals impermissibly substituted its judgment concerning the weight of the evidence for the jury's". The Opinion in the case at bar does not consider the affirmative duty placed on an employer, albeit under the Americans with Disabilities Act, as applicable to the Missouri Workers' Compensa-

tion Discrimination Statute. This is of monumental importance in the law, which deserves the considered Opinion of the Missouri Supreme Court, En banc. It is of tremendous importance in the State of Missouri whether the standard pronounced by the United States Supreme Court should be applied in discrimination cases in Missouri, including those under §287.780 RSMo. In *Fjellestad v. Pizza Hut of America, Inc.*, 188 F.3d 944 (8th Cir. 1999), the Court said, at 952: "Third, viewing the evidence in the light most favorable to Fjellestad, we believe a dispute exists whether Pizza Hut made a good faith effort to engage in the interactive process, and that a reasonable jury could conclude that Pizza Hut has not met its burden to engage in an interactive process to determine whether an appropriate reasonable accommodation existed." It was the jury's right to determine if Defendant demonstrated a bad faith, farcical effort to find Plaintiff a job within her medical restrictions by only offering three jobs it knew from her previous history she could not perform and cancelling a meeting about jobs she could do, when she wanted her attorney present. The recent Decision of the Federal 8th Circuit Court of Appeals in *Cravens, supra* is virtually on all fours. She could not return to her prior position, as she was restricted to no or minimal keyboard activity due to bi-lateral carpal tunnel syndrome. BlueCross and BlueShield argued that reassignment was not a mandatory accommodation, but the 8th Circuit specifically disagreed. It was held at *Cravens, supra* at 1015: "Specifically, we conclude that the definition of 'qualified individual with a disability' includes a disabled employee who cannot do his or her current job, but who desires and can perform, with or without reasonable accommodation, the essential functions of a vacant job

within the company to which he or she could be reassigned. Such a view of the reassignment duty is well-supported among the circuits." Under this law, the Defendant/Appellant had an affirmative duty to assign Plaintiff the sticker job, instructor job, supervisor job, or clerk job.

5. This is a first impression case, where Defendant violated Plaintiff's medical restrictions, assigning her work one year after her bi-lateral carpal tunnel surgery, which made her arms and hands swollen, to the point she couldn't use them. Respondent lost the ability to repeatedly use her hands and wrists due to her work for Appellant in the Summer, Fall, and Winter of 1995. Thereafter, Defendant offered her only three jobs Defendant knew she could not perform while other jobs were available, which she could perform within her medical restrictions, layed her off, and subsequently fired her. The Opinion, pages 6-7, states that according to the law, Appellant was entitled to terminate Respondent if she was not able to perform "her job or any of the jobs offered to her". That is not and should not be the law, as it permits an employer to selectively offer impossible jobs, as it did here. It is contrary to the spirit and meaning of §287.780 RSMo., the case law interpreting that statute, and the recent federal law, including the United States Supreme Court, *Reeves, supra*. The law is, to the contrary, if she is unable to perform any job (not due to the acts and conducts of the Employer), then the Employer is able to terminate her. That is not these facts. Contrary to the Opinion that she could not do any job, Plaintiff said she could do a job as an instructor or a supervisor, or put stickers on boxes without using a labeling gun, and those jobs were always open. Appellant had a duty to offer those jobs, but never did.

Defendant claimed Plaintiff would lose her seniority as an instructor or supervisor, but Plaintiff denied this and had specific evidence to the contrary. No Missouri case permits an Employer to render an Employee non-functional for certain physical jobs, refuse to give her an open light duty job, and then be able to lay her off and subsequently fire her. The Opinion sets a terrible new precedent, in that, it allows that action, which this jury condemned by its verdict.

WHEREFORE, Respondent/Plaintiff hereby applies for transfer to this Honorable Supreme Court under Rule 83.05 and reinstatement of the jury verdict.

/s/ Ray A. Gerritzen,
Attorney for Respondent

## APPENDIX 7

IN THE SUPREME COURT OF MISSOURI

No. SC82980

ETHEL STEPHENSON,
Respondent,

vs.

RASKAS DAIRY, INC.
Appellant.

**ORDER DENYING APPLICATION FOR TRANSFER**

[Entered: October 3, 2000]

Now at this day, on consideration of the respondent's application for transfer the above-entitled cause from the Missouri Court of Appeals, Eastern District, it is ordered that the said application be, and the same is hereby denied.

**STATE OF MISSOURI-Sct.**

I, Thomas F. Simon, Clerk of the Supreme Court of the State of Missouri, certify that the foregoing is a full, true and complete transcript of the judgment of said Supreme Court, entered of record at the September Session, 2000, and on the 3rd day of October, 2000, in the above-entitled cause.

Given under my hand and seal of said Court, at the City of Jefferson, this 3rd day of October, 2000.
/s/ Thomas Simon, Clerk